

Immediate Deadlines May Loom For Employee Retention Credit Claims

Alert

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In late 2023, the Internal Revenue Service (IRS) implemented three important initiatives that will impact employers who have filed, or intend to file, Employee Retention Credit (ERC) refund claims. This alert provides a brief summary of these initiatives and identifies important deadlines looming, perhaps as early as January 31, 2024, for employers holding possible ERC refund claims. This alert also discusses possible strategies for dealing with the new IRS initiatives.

BACKGROUND

The ERC – adopted initially as part of the Coronavirus Aid, Relief, and Economic Security Act – is available with respect to wages paid by “qualified employers” during the period beginning March 13, 2020, and ending September 30, 2021. An employer is a “qualified employer” for any quarter in which the employer either (a) suffered more than a 50% reduction in revenues compared to the same quarter in 2019 (or, for 2021 quarters only, more than a 20% reduction in revenues compared to the same quarter in 2019) or (b) incurred a complete or partial suspension of its business due to a COVID-related government order. The amount of the credit is capped at \$5,000 per employee for all of 2020, and \$7,000 per employee for each of the first three quarters of 2021.

Many (and perhaps most) employers were not fully aware of the benefits of the ERC when they filed their original quarterly federal payroll tax returns (Form 941) for 2020 and 2021. Nonetheless, as employers later became aware of the possible lucrative credits available, they began filing amended returns (Form 941-X) in droves, on which they claimed ERC refunds. As of October 2023, more than 3.6 million ERC refund claims had been filed, and over 800,000 of those claims had not been processed.

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Under the existing ERC legislation, refund claims for 2020 must be filed by April 15, 2024, and refund claims for 2021 must be filed by April 15, 2025. However, under pending tax legislation, the deadline for both years would be accelerated to January 31, 2024.

As reported in the press, the IRS suspects that many of the ERC claims may not be valid. This suspicion is fueled by concerns that aggressive ERC promoters – many of whom stand to receive contingent fees based on the amount of refunds received – have convinced unsuspecting employers to file claims that have no basis in fact or law.

Because of these concerns, the IRS and Congress have adopted, or are considering adopting, the initiatives described below.

MORATORIUM ON PROCESSING ERC CLAIMS

Effective September 14, 2023, the IRS announced that, until further notice, it would cease processing newly-filed (i.e., filed after September 14, 2023) ERC refund claims. Existing (i.e., filed prior to September 14, 2023) claims will still be processed. This moratorium currently remains in place.

WITHDRAWING ERC CLAIMS WITHOUT PENALTIES

Effective October 19, 2023, the IRS announced that any employer holding a pending ERC refund claim could withdraw the claim and avoid all civil penalties associated with the filing of the claim. This withdrawal program, which applies until further notice from the IRS, applies in the following situations: (a) a refund claim has been filed, but the IRS has not either paid a refund or denied the claim; (b) a refund claim has been filed, and the IRS has notified the employer that the claim is being audited (and the audit has not been resolved); or (c) a refund claim has been filed, and the employer has received the refund, but the employer has not cashed the refund check.

As indicated, the withdrawal program is still in place, but the IRS announced recently (early 2024) that it may be ending soon.

VOLUNTARY DISCLOSURE PROGRAM FOR REFUNDS RECEIVED

Effective December 21, 2023, and continuing until March 22, 2024, the IRS has implemented a voluntary disclosure program (VDP) for employers who have received ERC refunds. Under the VDP, an employer who has received an ERC refund may file a special Form 15434 and apply to participate in the VDP. The deadline for filing the VDP application is March 22, 2024. If the IRS accepts the application, the employer will enter into a closing agreement with the IRS, and the employer must repay 80% of the refund amount to the IRS within 10 days after the date of the closing agreement. Importantly, the employer is allowed to

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retain 20% of the refund, and the employer will not be subject to any civil penalties (or interest) associated with the refund claim.

The VDP option is not available if the IRS has notified the employer that the refund will be audited, or that the employer is subject to a criminal investigation. Notably, participating in the VDP does not provide any criminal immunity to the employer, which is different from other IRS voluntary disclosure programs. Also, in order to participate in the VDP, when filing its Form 15434 application, the employer must identify any consultant, promoter or return preparer who assisted the employer in evaluating and filing the employer's refund claim.

ACCELERATION OF ERC REFUND CLAIM DEADLINE

Under pending federal tax legislation – referred to as the Tax Relief for American Families and Workers Act of 2024 – the deadline for filing all ERC refund claims would be accelerated to January 31, 2024. Given that this legislation may not be passed until after January 31, if at all, it is not clear whether the January 31 deadline will remain in place. Nonetheless, for an employer who has not yet filed but intends to file an ERC refund claim, it may be advisable to file the claim before January 31.

PLANNING STRATEGIES

- Employers still intending to file ERC refund claims should, at a minimum, do so before the existing 2020 (refund claims due 4-14-24) and 2021 (refund claims due 4-15-25) deadlines. Also, due to the accelerated January 31, 2024 deadline stated in the pending tax legislation, employers should give strong consideration to meeting this January 31 deadline.
- If (a) an employer has received, but not cashed, an ERC refund check and (b) the employer intends to relinquish its ERC refund claim, the employer should consider cashing the refund check and participating in the VDP, rather than returning the check under the withdrawal program. Under the VDP, the employer is allowed to retain 20% of the refund. The employer should consider that participation in the VDP program does not provide criminal immunity.
- If (a) an employer has filed an ERC refund claim but has not yet received any type of response from the IRS and (b) the employer intends to relinquish its ERC refund claim, the employer should consider waiting until mid-March 2024 before withdrawing the claim. If the IRS happens to pay the refund before March 22, 2024, the employer may immediately file a VDP application, and if the application is accepted, the employer will be entitled to retain 20% of the refund. The employer should consider that participation in the VDP program does not provide criminal immunity.
- If an employer has filed an ERC refund claim and intends to withdraw the claim, the employer should be very careful to withdraw the claim on, or shortly after, March 22, 2024. (For the reasons mentioned

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above, the employer may want to wait until March 22, 2024, before withdrawing the claim.) The IRS has stated that it intends to eliminate the withdrawal program soon. If, for example, (a) the employer receives a refund check after March 22 (i.e., after the VDP expires) and (b) at such time, the IRS has eliminated the withdrawal program, the employer will be left with no safe harbor for avoiding civil penalties with respect to its refund claim.

For more information on the employee retention credit claims deadlines, please contact [Jay Simpson](#), [Charley Jensen](#), [Tom Molins](#) or the Stinson LLP contact with whom you regularly work.

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